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JAN 09 2007

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date:  
EAC 05 181 52292

IN RE: Petitioner: [REDACTED]

PETITION: Petition for Special Immigrant Battered Spouse Pursuant to Section 204(a)(1)(A)(iii) of the  
Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to  
the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Vermont Service Center Director denied the immigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action.

The petitioner is a native and citizen of Venezuela who is seeking classification as a special immigrant pursuant to section 204(a)(1)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(A)(iii), as the battered spouse of a United States citizen. The petitioner filed his Form I-360 on June 9, 2005.

On January 9, 2006, the director denied the petition, finding that the petitioner failed to establish that he had a qualifying relationship as the spouse, intended spouse or former spouse of a citizen or lawful permanent resident of the United States; was eligible for immigrant classification based on a qualifying relationship with a citizen or lawful permanent resident of the United States; and had been battered by, or had been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the qualifying relationship.

The petitioner submitted a timely appeal.

Section 204(a)(1)(A)(iii) of the Act provides, in pertinent part, that an alien who is the spouse of a United States citizen, who is a person of good moral character, who is eligible to be classified as an immediate relative, and who has resided with his or her spouse, may self-petition for immigrant classification if the alien demonstrates to the Attorney General that—

(aa) the marriage or the intent to marry the United States citizen was entered into in good faith by the alien; and

(bb) during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien's spouse or intended spouse.

The regulation at 8 C.F.R. § 204.2(c)(1)(i) states, in pertinent part, that:

A spouse may file a self-petition under section 204(a)(1)(A)(iii) or 204(a)(1)(B)(ii) of the Act for his or her classification as an immigrant relative or as a preference immigrant if he or she:

(A) Is the spouse of a citizen or lawful permanent resident of the United States;

(B) Is eligible for immigrant classification under section 201(b)(2)(A)(i) or 203(a)(2)(A) of the Act based on that relationship;

(C) Is residing in the United States;

(D) Has resided . . . with the citizen or lawful permanent resident spouse;

(E) Has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage; or is the parent of a child who has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage;

(F) Is a person of good moral character; [and]

\* \* \*

(H) Entered into the marriage to the citizen or lawful permanent resident in good faith.

The regulation at 8 C.F.R. § 204.2(c)(1)(vi) states, in pertinent part:

*Battery or extreme cruelty.* For the purpose of this chapter, the phrase “was battered by or was the subject of extreme cruelty” includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation . . . shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence. The qualifying abuse must have been committed by the citizen or lawful permanent resident spouse, must have been perpetrated against the self-petitioner . . . and must have taken place during the self-petitioner’s marriage to the abuser.

According to the evidence on the record, the petitioner and United States citizen D-R-<sup>1</sup> applied for a marriage license on November 1, 2001 in Kershaw County, South Carolina. The petitioner’s spouse filed a Form I-130 on his behalf on November 19, 2001 and withdrew the petition on April 1, 2005. The petitioner filed a Form I-485 concurrently with the Form I-130. The petitioner subsequently withdrew his Form I-485 application.

The first issue to be addressed in this proceeding is whether the petitioner established that he was the spouse, intended spouse of former spouse of a citizen or lawful permanent resident as of the date of filing the instant petition and is therefore eligible for the classification sought based on a qualifying relationship. As evidence that the petitioner was married to a United States citizen, he submitted a copy of a marriage license application and wedding pictures. In a request for additional evidence

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<sup>1</sup> The name is abbreviated for confidentiality reasons.

(RFE), the director informed the petitioner that for his marriage to be considered valid for immigration purposes, it must have been registered with a civil authority from the location where the marriage took place. In response to the RFE, the petitioner submitted photographs of a wedding celebration. The petitioner failed to submit evidence that his marriage had been registered with a civil authority. Accordingly, the director denied the petition. On appeal, the petitioner failed to submit evidence that his marriage had been registered with a civil authority. The regulation at 8 C.F.R. § 204.2(c)(2)(ii) states in pertinent part: "Primary evidence of a marital relationship is a marriage certificate issued by civil authorities." The petitioner failed to submit such primary evidence, or to indicate why, if applicable, it is unavailable.

A petitioner cannot establish his eligibility for classification under section 201(b)(2)(A)(i) of the Act, based on a qualifying relationship if he fails to establish that he has a qualifying relationship.

The next issue to be addressed is whether the petitioner established that he has been battered by, or has been subjected to extreme cruelty perpetrated by, his citizen spouse. The regulation at 8 C.F.R. § 204.2(c)(1)(i)(E) requires the petitioner to establish that he has been battered by, or has been the subject of extreme cruelty perpetrated by, his U.S. citizen spouse during their marriage.

Because the petitioner furnished insufficient evidence to establish that he has been abused by, or the subject of extreme cruelty perpetrated by, his citizen spouse, the director asked him to submit additional evidence on September 30, 2005. The director listed evidence the petitioner could submit to establish battery or extreme mental cruelty. The petitioner responded to the request on October 31, 2005.

The evidence relating to abuse consists of the following:

An undated letter submitted on appeal from the petitioner's spouse stating that she admits that she "subjected [the petitioner] to extreme mental cruelty by accepting the vows of marriage with him, but then betraying those vows by having an extramarital relationship with another man. I subsequently had a child . . . as a result of that [extramarital] relationship, forcing me to abandon [the petitioner]."

- A copy of the petitioner's wife's son's birth certificate.
- A typed letter dated February 7, 2006 from [REDACTED] stating that the petitioner's spouse had an extramarital relationship with another man and as a result of that relationship, she had a child and "for that reason [the petitioner and his spouse] had to separate."
- A letter dated February 2, 2006 from [REDACTED] which is almost identical to that of [REDACTED]

Evidence that on April 1, 2005, the petitioner's wife withdrew her Form I-130 petition that she had filed on the petitioner's behalf.

The director determined, and the AAO concurs, that the extramarital affair and abandonment described by the petitioner do not constitute battery or extreme mental cruelty. First, the petitioner's spouse did not perpetrate the abuse [extramarital affair] against the petitioner. Nor has the petitioner shown that his spouse's conduct (affair, abandonment, and withdrawal) was a part of an overall pattern of violence. Accordingly, the petitioner has not established that he has been battered by, or subjected to extreme cruelty by, his United States citizen spouse. He is thus ineligible for classification under section 204(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii), and his self-petition must be denied.

We concur with the director's determination that the petitioner failed to establish his eligibility for the classification sought. The evidence submitted on appeal does not overcome this basis for denial and the petition may not be approved. However, the case will be remanded because the director failed to issue a Notice of Intent to Deny (NOID).

The regulation at 8 C.F.R. § 204.2(c)(3)(ii) states, in pertinent part:

*Notice of intent to deny.* If the preliminary decision on a properly filed self-petition is adverse to the self-petition, the self-petitioner will be provided with written notice of this fact and offered an opportunity to present additional information or arguments before a final decision is rendered.

In this case, the director denied the petition without first issuing a NOID. Consequently, the case must be remanded for issuance of an NOID pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii), which will give the petitioner a final opportunity to overcome the deficiencies of his case.

The case will be remanded for the purpose of the issuance of a new notice of intent to deny as well as a new final decision to both the petitioner and counsel. The new decision, if adverse to the petitioner, shall be certified to this office for review.

As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with this decision.